TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
a. Summary of the proceedings	3
b. The Investigations	5
1. Edward J. Garrity	5
2. Helen B. Naglee (deceased)	8
3. Edward Virtue	10
4. James Holroyd	11
5. Eugene D. Elwell	13
6. Donald Murray	15
c. The Trial	17
d. Opinions in the New Jersey Supreme Court	19
THE QUESTION OF JURISDICTION	21
SUMMARY OF ARGUMENT	25
ARGUMENT:	
Point I—Testimony of a police officer given voluntarily in an official investigation relating to his duties, after he has been fully apprised that he can refuse to testify, that his testimony must	

PAGE

be of his own free will, that his testimony could be used against him in a criminal proceeding and that his refusal to testify might subject him to removal from office in a proper proceeding, is admissible in a criminal proceeding in which he is a defendant and does not result in a denial of the privilege against self-incrimination under the Fourteenth Amendment 30

A. A police officer is subject to strict standards of conduct and is under a solemn duty to enforce the criminal laws and to cooperate fully in the administration of justice..... 30

B. A police officer has the duty to testify fully and frankly in official proceedings relating to his office and his failure to so cooperate, in appropriate circumstances, reflects a lack of fitness for public office, is inconsistent with his public duties and constitutes a justifiable basis for his removal in proper proceedings 34

1. General principles 34

2. The law of the State of New Jersey..... 41

C. The advice to a police officer in the course of an official investigation relating to his activities that he has the privilege to refuse to testify, that any testimony he gives must be voluntary and that such testimony may be used against him in a criminal proceeding, coupled with the advice that his failure to testify might result in proceedings for removal, is fair and reasonable and does not constitute a threat or coercion..... 48

PAGE

Point II—The New Jersey Supreme Court has full responsibility over the internal administration of the state judicial system including the issuance and disposition of local traffic tickets, and there was no denial of due process of law because the New Jersey Supreme Court which affirmed the convictions herein ordered an investigation to be conducted by the Attorney General with respect to "ticket-fixing" activities and, without further intercession by the court, the matter was referred to the prosecutor who completed the investigation and the criminal prosecution..... 56

A. The Supreme Court of New Jersey has full control and jurisdiction over the state judiciary including the supervision of the operations of Municipal Courts and the issuance and disposition of local traffic tickets 57

B. The Supreme Court of New Jersey was neither prejudiced, as a matter of law, nor is there any factual basis to support a finding of actual prejudice or partiality legally sufficient to require a reversal of appellants' conviction 60

Point III—Appellants have no standing to raise on appeal before this Court for the first time the issue that their convictions should be reversed because there was a denial of due process as a result of prejudice of the New Jersey Supreme Court..... 63

CONCLUSION 65

PAGE

APPENDIX:

A—Prescribed Procedure for the Issuance and Control of the Uniform Traffic Ticket..... 1a

B—Annual Report of the Administrative Director of the Courts—1964-1965..... 12a

Cases Cited

Albertson v. Millard, 345 U. S. 242..... 45

American Tobacco Co. v. United States, 147 F. 2d 93 (6th Cir. 1944), aff'd 328 U. S. 781 (1945)..... 61

Anonymous v. Baker, 360 U. S. 287..... 23

Belian v. Board of Education, 357 U. S. 399.....36, 40

Blair v. Osterlein, 275 U. S. 220..... 64

Callahan v. New Orleans Police Dept., 171 So. 2d 730 (La. Ct. App. 1965)..... 37

Canteline v. McClellan, 282 N. Y. 166, 25 N. E. 2d 972 (Ct. App. 1940)..... 39

Christal v. Police Commission, 33 Cal. App. 2d 564, 92 P. 2d 416 (Dist. Ct. of App. 1939)..... 38

Cramp v. Board of Public Instruction, 368 U. S. 278.. 45

Cohen v. Hurley, 366 U. S. 117..... 35

Conlon v. Murphy, 24 A. D. 2d 737, 263 N. Y. S. 2d 360 (1965) 40

Culombe v. Connecticut, 367 U. S. 568..... 54

Drury v. Hurley, 339 Ill. App. 33, 88 N. E. 2d 728 (1949), cert. den., 339 U. S. 983..... 39

Escobedo v. State of Illinois, 378 U. S. 478..... 54

PAGE

Fallon v. New Orleans Police Dept., 238 La. 531, 115 So. 2d 844 (1959) 38

Fichera v. Sate Personnel Board, 217 Cal. App. 2d 613, 32 Cal. Rptr. 159 (Dist. Ct. of App. 1963) 38

Fromm v. Bd. of Directors of Police, etc., Retire Spt., 81 N. J. Super. 138, 195 A. 2d 32 (App. Div. 1963) .. 32

Frost Trucking Co. v. Railroad Commission, 271 U. S. 583 52

Gardner v. Murphy, 46 Misc. 2d 728, 260 N. Y. S. 2d 739 (Sup. Ct. Spec. T. 1965) 49

George Siegler Co. v. Norton, 8 N. J. 374, 86 A. 2d 8 (1952) 57

Globe Indemnity Co. v. Calbeck, 230 F. Supp. 14 (D. C. S. D. Texas 1960) 64

Herbert v. Atlantic City, 87 N. J. L. 98, 101, 93 Atl. 80, 81 (Sup. Ct. 1915) 32

In re Cohen, 56 N. J. Super. 502, 507, 153 A. 2d 708, 711 (App. Div. 1959) 32

In re Emmons, 63 N. J. Super. 136, 141, 164 A. 2d 184, 187 (App. Div. 1960) 31, 45

In re Larsen, 17 N. J. Super. 564, 86 A. 2d 430 (App. Div. 1952) 62

In re Mattera, 34 N. J. 259, 168 A. 2d 38 (1961) ..57, 59, 62

In re Murchison, 349 U. S. 133 60

In re Orsini, 37 N. J. 500, 181 A. 2d 771 (1962) 62

In re Pfizer, 6 N. J. 233, 78 A. 2d 80 (1951) 57

PAGE

In the Matter of Spevak, 16 N. Y. 2d 1048, 213 N. E. 2d 457 (1965), remittitur amended, 17 N. Y. 2d 490, 214 N. E. 2d 373 (1966), cert. granted, 383 U. S. 942 (No. 944, 1965 Term, renumbered No. 62, 1966 Term) 35

Kaufman v. Hurwitz, 176 F. 2d 210 (4th Cir. 1949)... 34

Kramer v. U. S., 166 F. 2d 515 (9th Cir. 1948)..... 64

Kendall v. United States, 37 U. S. (12 Pet.) 524 (1838) 58

Krieger v. Jersey City, 27 N. J. 535, 143 A. 2d 564 (1958) 57

Koutnik v. Murphy, 25 A. D. 2d 197, 268 N. Y. S. 2d 265 (1966)..... 40

Laba v. Newark Board of Education, 23 N. J. 364, 129 A. 2d 273 (1957)..... 45

Lerner v. Casey, 357 U. S. 468.....23, 24, 36, 40

Loughlin v. U. S., 151 F. 2d 281 (D. C. Cir. 1945).... 64

Lucas v. U. S., 325 F. 2d 867 (9th Cir. 1963)..... 64

Malloy v. Hogan, 378 U. S. 1..... 35

Martin v. Smith, 100 N. J. L. 50, 52, 125 Atl. 142, 143 (Sup. Ct. 1924)..... 31

Maryland v. Soper, 270 U. S. 9..... 34

Massett Building Co. v. Bennett, 4 N. J. 53, 71 A. 2d 327 (1950)..... 59

McAuliffe v. City of New Bedford, 155 Mass. 216, 29 N. E. 517 (1892).....32, 33

McCandless v. Furland, 293 U. S. 67..... 64

Miami v. Jervis, 139 So. 2d 513 (Fla. D. C. A. 1962).. 39

Miranda v. Arizona, 384 U. S. 436.....25, 54

PAGE

Moorestown Tp. v. Armstrong, 89 N. J. Super. 560, 566, 215 A. 2d 775, 778 (App. Div. 1965), cert. den., 47 N. J. 80, 219 A. 2d 417 (1966) 31

Moretti v. Civil Service Bd., 2 Ill. App. 2d 89, 118 N. E. 2d 615 (1954) 39

Nelson v. County of Los Angeles, 362 U. S. 1 ..... 23, 24, 36, 40, 45

Newark v. Depart. of Civil Service, 68 N. J. Super. 416, 172 A. 2d 681 (App. Div. 1961) 45

Oklahoma v. U. S. Civil Service Commission, 330 U. S. 127 64

Orloff v. Willoughby, 345 U. S. 83, rehearing den., 345 U. S. 931 35

Pachecho v. Puerto Rico, 300 F. 2d 759 (1st Cir. 1962) 64

Parker v. Motor Boat Sales, 314 U. S. 244 64

People v. Wheatman, 48 Misc. 2d 85, 264 N. Y. S. 2d 292 (1965) 50, 52

Pfitzinger v. United States Civil Service Commission, 96 F. Supp. 1, 3 (D. C. N. J. 1951), aff'd, 192 F. 2d 934 (3rd Cir. 1951) 33

Pino v. Bertone, 26 N. J. Super. 429, 98 A. 2d 345, (L. Div. 1953) 57

Regan v. New York, 349 U. S. 38 ..... 24, 50

Reilly v. Ozzard, 33 N. J. 529 (1960) 62

Reynolds v. United States, 98 U. S. 145 (1878) 61

Rice v. Sioux City Memorial Park Cemetery, 349 U. S. 70 24

PAGE

Rogers v. Richmond, 365 U. S. 534, 541 ..... 46, 54

Scholl v. Bell, 125 Ky. 750, 102 S. W. 248 (Ct. App. 1907) 39

Shapiro v. United States, 335 U. S. 1 34

Slochower v. Board of Education, 350 U. S. 551 ..... 24, 39

Souder v. Philadelphia, 305 Pa. 1, 156 A. 245 (1931) .. 39

Spector Motor Co. v. McLaughlin, 323 U. S. 101 45

Spina v. Consolidated Police, etc., Pension Fund Com., 41 N. J. 391, 400, 197 A. 2d 169, 173 (1964) 33

State v. Ahrens, 25 N. J. Super. 201, 95 A. 2d 525 (App. Div. 1953) 57

State v. Scarborough, 75 N. M. 702, 410 P. 2d 732 (1966) 59

State v. Kimberlin, 246 La. 441, 165 So. 2d 279 (1964) 51

State v. Otis Elevator Co., 12 N. J. 1, 95 A. 2d 715 (1953) 57

State of New Jersey v. Holroyd, 44 N. J. 259, 208 A. 2d 146 ..... 1, 4, 19, 20fn

State of New Jersey v. Naglee, 44 N. J. 209, 207 A. 2d 689 ..... 1, 4, 19, 20, 22

Steinburg v. United States, 163 F. Supp. 590 (Ct. Cl. 1958) 39

Stevens v. Marks, 383 U. S. 234 ..... 24, 50, 52

Taylor v. U. S., 179 F. 2d 640 (9th Cir. 1950) 64

Tumey v. Ohio, 273 U. S. 510 61

PAGE

United Electrical Radio & M. Wkrs. v. General Elec. Co., 127 F. Supp. 934 (1954), affirmed in part and reversed on other grounds, 231 F. 2d 259 (D. C. Cir. 1956), cert. den., 352 U. S. 872..... 35

United Public Workers v. Mitchell, 330 U. S. 75..... 33

United States v. Burr, 25 Fed. Cas. 51 (1807)..... 61

United States, ex rel. Carthan v. Sheriff, City of New York, 330 F. 2d 100 (2nd Cir. 1964), cert. den., 379 U. S. 929.....49, 52

United States v. Valenti, 120 F. Supp. 80 (D. N. J. 1954) 61

United States v. Warden of Wallhill Prison, 246 F. Supp. 72 (S. D. N. Y. 1965), aff'd per curiam, 355 F. 2d 208 (2d Cir. 1966).....36, 50, 52

Wirtshafter v. Pennsylvania, 206 Pa. Super. 721, 211 A. 2d 926 (1965), allocatur den., Pa. Super. (Pa. Sup. Ct. 1966), cert. den., 35 U. S. L. Week 3127 (U. S. Oct. 10, 1966) (No. 49 Misc.)..... 51

Yakus v. U. S., 321 U. S. 414..... 64

United States Constitution Cited

Amendment I..... 41

Amendment V.....2, 27, 35, 41

Amendment XIV.....2, 3, 29, 30, 35

New Jersey Constitution Cited

Art. VI, §11, par. 3..... 57

Art. VI, §VII, par. 1..... 57

PAGE

Statutes Cited

Cal. Ann. Code, §18676-7 (1945)..... 36

D. C. Code, §-319a (Supp. 1961)..... 36

La. Const., Art. 14, §15(P)(1) (1955).....36, 37

Md. Ann. Code, 69 §11 (1957)..... 36

N.J.S.A. 2A:81-17.1 (Supp. 1965).....20, 21, 36, 41, 42

N.J.S.A. 2A:98-1..... 25

N.J.S. 2A-3A, 1965 Cum. Pocket Part, p. 141 (L. 1953, c. 259) (Assembly Bill No. 607)..... 42

N.J.S.A. 40:69A-167..... 42

N.J.S.A. 40:103-5(92)..... 42

N. Y. Const., Art. 1, §6 (Supp. 1965)..... 36

New York City Charter, §1123 (1963)..... 36

Revised Laws of Hawaii, 1 §5-4 (1955)..... 36

5 U. S. C. §2283..... 39

28 U. S. C. §1257(2)..... 1, 21

28 U. S. C. §2103..... 1, 23

V.A.M.S. §36.410 (1951) (Missouri)..... 36

Rules Cited

New Jersey Rules of Practice and Procedure:

R.R. 8:10-2..... 58

R.R. 4:87-2..... 58

R.R. 1:10-1(a)..... 60

Rule 19 United States Supreme Court, 28 U. S. C. A. (Supp. 1965)..... 23

PAGE

Other Authorities Cited

Annot., 44 A. L. R. 2d 789 (1955) 41

Hook, Common Sense and the Fifth Amendment 73, (1957) 47

Mayers, Shall We Amend the Fifth Amendment, 151-152 (1959) 36, 46

Note, Denying the Privilege Against Self-Incrimination to Public Officers, 64 Harv. L. Rev. 987 (1951) 47

Note, Mandatory Dismissal of Public Personnel and the Privilege Against Self-Incrimination, 101 U. Pa. L. Rev. 1190, 1201 (1953) 46

Note 27, Geor. Wash. L. Rev., 382, 387 (1958) 39

Ratner, Consequences of Exercising the Privilege Against Self-Incrimination, 24 U. Chi. L. Rev. 472, 503-504 (1957) 41

Opinions Below

There are involved two opinions of the Supreme Court of New Jersey comprising these consolidated appeals. The opinion relating to appellants Garrity, Virtue and Naglee is reported as *State of New Jersey* v. *Naglee,* at 44 N. J. 209, 207 A. 2d 689. It was rendered on March 1, 1965 and appears in the record in R. 13(1) 316. The opinion relating to the appellants Holroyd, Elwell and Murray is reported as *State of New Jersey* v. *Holroyd, et al.* at 44 N. J. 259, 208 A. 2d 146. It was rendered on March 15, 1965 and appears in the record in R. 13(2) 553.

Jurisdiction

Appellants seek to invoke the appeal jurisdiction of this Court under 28 U. S. C. §1257(2). In the alternative, appellants seek to have their appeal entertained as a petition for a writ of *certiorari* under 28 U. S. C. §2103.

A Jurisdictional Statement was filed by appellants on July 22, 1965. On March 21, 1966, this Court entered an order reserving the jurisdictional question and postponing its consideration to the hearing of the case on the merits. 383 U. S. 941. R. 13(2) 562.

Questions Presented

1. Where (a) the laws of a state impose a duty upon police officers to testify in offical investigations relating to the performance of their duties and permit the removal from office of such officers in an appropriate proceeding if the failure to so testify reflects a lack of fitness for public office and (b) a police officer in the course of such investigation is advised of the possibility of his being removed from office for failure to so testify and is further advised at the same time that he was a privilege to refuse to testify,

that any testimony he gives must be of his own free will and that such testimony may be used against him; does such advice, without more, constitute a threat or coercion so that any resultant testimony must be deemed involuntary and inadmissible in a criminal proceeding under the 14th Amendment?

2. Is there a denial of Due Process under the 14th Amendment by virtue of the fact that a State Supreme Court which has jurisdiction over the administration of the state judiciary, including the issuance and disposition of local traffic tickets, initiated an investigation by the State Attorney General of "ticket fixing" involving appellants who were local police officers and eventually the Court sat in final review of the appellants' convictions after the matter, in due course and without further intercession by the Court, was referred to the prosecutor who continued the investigation and presented the matter to a grand jury, indictments were returned and there was a full trial in the appropriate lower state court?

3. Do appellants convicted of crime under state law have the right or standing to raise for the first time on an appeal to this Court the question of deprivation of Due Process under the 14th Amendment on the ground that the highest court which affirmed the convictions had originally initiated the investigation where the defendants had never previously raised such issue?

Constitutional Provisions Involved

United States Constitution, Amendment V:

> "No person shall . . . be compelled in any criminal case to be a witness against himself . . ."

United States Constitution, Amendment XIV, Section 1:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

The appellants herein were tried and convicted in two separate proceedings, which have been consolidated on appeal to this Court.

The appellants in one case consisted of Edward J. Garrity and Edward Virtue, police officers of the Borough of Bellmawr, New Jersey, and Helen B. Naglee, now deceased, the Violations Clerk and Court Clerk of the Municipal Court of the Borough of Bellmawr. The second group was composed of James Holroyd, Eugene D. Elwell and Donald Murray, police officers of the Borough of Barrington, each of whom had served as Deputy Violation Clerk of the Municipal Court of the Borough of Barrington.

a. Summary of the proceedings.

The Supreme Court of New Jersey, on June 30, 1961 entered orders directing the Attorney General of the State of New Jersey to investigate the handling of cases in the Municipal Courts of Barrington and Bellmawr and the conduct of all the persons connected therewith (A63a to A66a). Alleged irregularities in the handling of cases in the aforementioned courts had been brought to the attention of the Supreme Court by the Administrative Director of Courts. The Attorney General assigned a Deputy Attorney General to the investigations.

Members of the Barrington Police Department were examined on August 4, 1961, in the presence of an official

court stenographer. The officers (Holroyd, Elwell and Murray), in the presence of their attorney, were fully advised of their legal rights and status by the Deputy (R. 13(2) 351-353, 355-356, 357-358). Each indicated that this was fully understood and would voluntarily give testimony (R. 13(2) 353, 356, 358).

The Bellmawr examination (Naglee, Garrity and White) took place on November 10, 1961. The parties were similarly advised of their rights and status (R. 13(1) 86, 91, 108) and indicated their willingness to testify (R. 13(1) 86, 91, 108). Arrangements were made with Chief Garrity for the taking of statements (R. 13(1) 36). Provisions had been made to have an attorney present for Garrity, but he didn't feel it was necessary (R. 13(1) 53).

Mr. Riggs took statements from each officer pursuant to his investigation. The matter was subsequently referred to the Camden County Prosecutor's office which continued the investigation (R. 13(1) 59, 70). Assistant Prosecutor Sidney Kaplan was assigned to the investigation.

In December, 1962 Mr. Kaplan investigated the officers. After apprising them of their legal rights (R. 13(1) 58-59, 75, 79-80), he took further testimony. The results of both investigations were presented to the Camden County Grand Jury which returned indictments in both cases (R. 13(1) 1, and R. 13(2) 333).

Both cases were tried before the Honorable Anthony C. Mitchell, J.C.C., of the Camden County Court, Law Division, the *Naglee* case on April 29, 1963, the *Holroyd* case on May 27, 1963 (R. 13(1) 11; R. 13 (2) 336). Judgments of conviction for the crime of Conspiracy to Pervert or Obstruct Due Administration of Laws against the defendants were entered on September 26, 1963 (R. 13(1) 312; R. 13(2) 552).

Appeals were separately taken to the Superior Court of New Jersey, Appellate Division (R. 13(1) 315; R. 13(2) 552). The Supreme Court of New Jersey, in both cases, certified the matter on its own motion before argument in the Appellate Division (R. 13(1) 317; R. 13(2) 554). The cases were heard separately on January 5, 1965, and were affirmed (R. 13(1) 330; R. 13(2) 558).

Notices of Appeal to the United States Supreme Court were given on May 25, 1965, and June 11, 1965 (R. 13(1) 330; R. 13(2) 560) and a Jurisdictional Statement submitted (R. 13(2) 562). The cases were consolidated on appeal.

On March 21, 1966, the United States Supreme Court ordered further consideration of the question of jurisdiction postponed to the hearing of the case on the merits (R. 13(2) 562).

b. The Investigations

Prior to the taking of testimony, Deputy Attorney Generall Rigg apprised each appellant of his legal rights and status. Reproduced herein are the statements of Deputy Rigg and a summary of the testimony of each party. Also reproduced are the statements of Assistant Prosecutor Kaplan. The statements of Rigg precede the statements of Kaplan.

1. Edward J. Garrity (R. 13(1) 108)

> "Q. [By Mr. Rigg]: Before I get started, because of the lateness of the hour and other commitments, I will undoubtedly have to question you again, as well as Mrs. Naglee and perhaps one or two of the other officers.

I would just like to establish a few things here quickly now. Before I do, however, you and I are aware of the purposes of the investigation of your being here today. Before I ask you any questions concerning this investigation into the alleged irregularities of the handling of the Municipal Traffic Violations by your department, I want to advise you that anything you say must be said of your own free will and accord without any threats or promises or coercion and anything you say may be, of course, used against you or any other person in any subsequent criminal proceedings in the courts of our state.

You do have, under our law, as you probably know, a privilege to refuse to make any disclosure which may tend to incriminate you. If you make a disclosure with knowledge of this right or privilege, voluntarily, you thereby waive that right or privilege in relation to any other questions which I might put to you relevant to such disclosure in this investigation.

This right or privilege which you have is somewhat limited to the extent that you as a police officer under the laws of our state, may be subjected to a proceeding to have you removed from office if you refuse to answer a question put to you under oath pertaining to your office or your function within that office. It doesn't mean, however, you can't exercise that right. You do have the right. A. No, I will cooperate.

Q. Understanding this, are you willing to proceed at this time and answer any questions? A. Yes."

In testimony given to Deputy Attorney General Rigg and subsequently to Camden County Assistant Prosecutor Kaplan, Garrity indicated the procedure for altering or changing tickets.

He indicated that no change or alteration was done without his direction, authority or consent (R. 13(1) 172, 174, 181, 182). Further, no alterations were made without the consent of the issuing officer (R. 13(1) 182). Garrity testified that he knew that he had no authority to alter the tickets and never indicated he had such authority to Mrs. Naglee (R. 13(1) 173).

In one case, Garrity gave as reason for his conduct that the defendant wasn't a "bad guy" and that he (Garrity) wanted to dispell the defendant's idea that they were "trying to railroad the Pennsylvania motorists" (R. 13(1) 176, 177). He further advised the defendant that it was better not to appear since he would probably be charged more than if he waived his appearance and forfeited his bail (R. 13(1) 177).

In another instance, a ticket was altered because the violator was a truck driver who had a lot of children and was going to lose his job (R. 13(1) 185, 186). Assistant Prosecutor Kaplan took up the investigation in December, 1962. His statement to Chief Garrity follows:

> "Question, Chief Garrity, of course the background of this is the idea that in Bellmawr there was a policy or practice of what is commonly known as fixing tickets which meant altering or changing of traffic tickets and I believe that you are familiar with the fact that that is something that has been suggested. * * * There are some questions we wanted to ask you and before I do, I want to advise you that anything you say must be voluntary, of your own free will and accord, without threats, promises or coercion. Anything you say may be used against you or any person at any subsequent proceeding in the courts of our state. You do have the

privilege under our laws to refuse to make any disclosures which you feel may tend to incriminate you. Now, shall we proceed? Answer, Yes sir." (R. 13(1) 180-181).

Garrity's testimony to Kaplan again admitted to the alterations, and went into greater particularity on individual tickets (R. 13(1) 181-192).

2. Helen B. Naglee (deceased) (R. 13(1) 91)

"Q. [By Mr. Rigg]: Mrs. Naglee, as you know, I am working under a Supreme Court order dated this last June whereby or whereunder I am directed to conduct an investigation of certain irregularities in the handling of motor vehicle cases in the Municipal Court, and apparently the police department here in the Borough of Bellmawr, and it is pursuant to that order that I have asked you to answer some questions which I want to put to you. Before you do, however, I want you to be fully aware of the fact that anything you say must be voluntary and of your own free will and accord without any threats, promises or reward or any coercion.

"You do have a privilege to refuse to make any disclosures or give any answers which may tend to incriminate you or any other person in a subsequent criminal proceeding. That is why you have that privilege under the law.

However, if you do answer a question and make a disclosure, by doing so you thereby waive this right or privilege that you have in relation to the entire investigation. You understand that? A. I do.

Q. And understanding that you are willing to proceed then? A. Yes."

Mrs. Naglee testified that it was a practice in Bellmawr to alter tickets in certain instances (*i.e.*, hardship cases) (R. 13(1) 194). She indicated that she participated in the alterations but didn't feel that what she was doing was unlawful (R. 13(1) 164).

She further admitted signing the judge's name on some of the summonses where, in the space for "court action" there were notations of a date of a proported appearance and plea of guilty as well as a designation of fine and cost, and the proported signature of the judge, where, in fact, the defendant never appeared in court (R. 13(1) 165).

Mrs. Naglee was investigated by Assistant Prosecutor Kaplan in December of 1962. His statement to her was as follows:

> "Helen B. Naglee, sworn, by Mr. Kaplan: Question, Now, Mrs. Naglee, you are connected with the municipal court in Bellmawr? Answer, Yes. Question, In what capacity? Answer, Court clerk and Borough violations clerk. Question, That work deals with police work involving traffic cases, matters of that sort. Answer, That's right. Question, • • • I want to ask you some question, but before I do, I want to advise you anything you say must be voluntary and of your own free will and accord, without any threats, promises or coercion, and anything you say may be used against you or against any other person in any subsequent actions, and you have the privilege of refusing to make any disclosures which you feel may incriminate you. Do you understand that? Answer, Yes sir. Question, Are you willing to proceed? Answer, Yes." (R.13(1) 192, 193).

Mrs. Naglee's testimony to Kaplan was similar in import to that given to Rigg. She testified in greater particularity as to the exact changes made in individual tickets, giving "hardship" as the reason for the changes (R. 13(1) 194-199).

3. Edward Virtue (R. 13(1) 86)

Q. [By Mr. Rigg]: "As you know by now, Detective, I am working under a Supreme Court order issued last June directing me to investigate certain irregularities in the handling of motor vehicle matters in the Municipal Court here in Bellmawr, together with various persons having any connection with the court, including the police department. That is why I scheduled this day, to ask you questions pertaining to this investigation.

"Before I do, I want to advise you anything you say must be voluntary, of your own free will, without threats or coercion or promise of reward and anything you say may be used against you in a subsequent criminal proceeding or proceedings in the courts of our state. You do have under our statutes, as you may know, a privilege to refuse to disclose any matters which may tend to incriminate you; however, if you make such a disclosure with knowledge of this right and without coercion, you may thereby waive this right or privilege with regard to any phase of this investigation.

"This right or privilege that you have is limited to the extent that you, as a police officer, when sworn and asked questions pertaining to your office and your conduct therein, if you refuse to answer, you then may be subject to a proceeding to have you removed from the department. A. Right."

Virtue testified to the fact that he was aware of the practice of ticket fixing and had participated in the alterations (R. 13(1) 156-157). Some of the tickets he altered himself, others he consented to (R. 13(1) 200). He further testified that he was aware that it was established practice in Bellmawr to alter drunken driving cases to careless driving and disorderly conduct charges in hardship cases (R.13(1) 205).

Officer Virtue was investigated by Assistant Prosecutor Kaplan in December of 1962. Kaplan's statement is as follows:

> "Question, Now before we begin, I want to advise you anything you say must be voluntary, of your own free will and accord, without any threats, promises or coercion, and anything you say may be used against you or against any person in any subsequent proceeding in the courts of our state. You do have the privilege under our laws to refuse to make any disclosures which you feel may tend to incriminate you. Do you understand that? Answer, Yes." (R. 13(1) 199).

Virtue testified in detail as to individual alterations (R. 13(1) 199-207). He indicated that it was not uncommon to downgrade a drunken driving charge to a disorderly conduct and careless driving charge in a "hardship" case (R. 13(1) 202).

4. James Holroyd (R. 13(2) 358)

> Q. [By Mr. Rigg]: "All right, under a Supreme Court order dated the 20th of June, 1961, I have been directed to investigate irregularities in the handling of municipal court vehicle matters in the

Borough of Barrington, and how they have been handled by the court, and local police departments. As a result, I have asked you to come in here today so that I may put questions to you. A. Yes.

Q. I want you to realize fully, however, any answers you give must be voluntary, without any coercion, threat, or promise of reward, and those answers may be used against you or any other person. You have a privilege to refuse to disclose any matters which might tend to incriminate you, however, if you make such a disclosure you thereby waive your right or privilege in relation to any phase of this investigation in the future.

Under our laws, as a police officer, you are subject to a statute which provides, however, if you exercise this right or privilege, a proceeding may be instituted against you to have you removed from office. A. Yes.

Q. Knowing of all this, you are willing to proceed? A. Yes."

Lt. Holroyd testified that he knew of and participated in the alterations (R. 13(2) 358). He said that the tickets altered by other officers would have to be cleared with him first; that this was the "practice" (R. 13(2) 358). He gave as the reasons for the alterations "hardships" or a friend would request a ticket of a friend of his be changed (R. 13(2) 359). Holroyd stated that he received nothing for his alterations (R. 13(2) 360).

Officer Holroyd was investigated by Assistant Prosecutor Kaplan in December of 1962. Kaplan's statement is as follows:

"* * * Question, I am going to ask you some questions, but before I do, I want to advise you anything you say must be of course of your own free will, and without any threats, coercion, promises or reward, and I advise you further that you have as has every citizen under the law of New Jersey, the privilege of refusing to disclose any matter which might incriminate you, and further with the full knowledge of this right, if you make any disclosures pertaining to this investigation, you waive that right of privilege with reference to any phase of the investigation which might involve you. With that understanding, you are ready to proceed? Answer, Yes." (R. 13(2) 377-378).

Mr. Holroyd further testified to the usual procedure and method of altering tickets and obtaining a receipt for the fines (R. 13(2) 378-382).

5. Eugene D. Elwell (R. 13(2), 352, 353)

Q. [By Mr. Rigg]: "Mr. Elwell, as you know, I have been directed by the Supreme Court order dated the 30th of June, 1961, to investigate irregularities in the handling of motor vehicle matters in the Municipal Court of Barrington, together with the conduct of all persons connected with this Court, and specifically the police department. It is for this reason I have asked you to be here today, so I could ask you certain questions pertaining to this investigation.

"I want to advise you anything you say to me must of course be of your own free will and of course without any threats, coercion, or promise of reward.

> I advise you further that you do have as every citizen has, under the laws of New Jersey, a privilege to refuse to disclose any matter which may tend to incriminate you, and further with full knowledge of this investigation, you thereby waive this right of privilege, in relation to any phase of this investigation, which might involve you. This privilege is somewhat limited, under our laws, to the extent that a police officer who under oath during investigation, fails to testify or answer a specific question does thereby jeopardize his position on the force and may be removed under the proper proceedings. Understanding that, do you wish to proceed this morning and answer the questions which I intend to put to you? A. I do, sir."

Officer Elwell stated that he personally altered tickets during 1959, motivated by "hardship" cases or to "try to do a man a favor" (R. 13(2) 353). He also changed tickets at the behest of other officers, and stated that just about all the police officers in the force had at one time or another contacted him in this regard (R. 13(2) 354). Elwell further testified that he always altered the tickets at the behest of the defendant, and that he never received anything for altering a ticket (R. 13(2) 355).

The procedure followed in altering tickets was thusly explained by Elwell:

> ". . ., the one requesting the favor being done would naturally come to me about it first, he would have the five dollars, whatever it would be, for parking and ask if it was all right and I said yes, and the five dollars would be turned in with the defendant's copy and the one requesting the favor would scratch

it out or I would have done it, or just let the five dollars be attached to it and Murray, as violations clerk, would scratch it out. In that case, the defendant wouldn't receive a copy of his receipt." (R. 13 (2) 367).

Officer Elwell was questioned by Assistant Prosecutor Kaplan in December, 1962. Mr. Kaplan stated:

"* * * Question, we have been following a certain pattern in this interrogation, and we will get to that. But, before we do, I want to advise you anything you say to me must be of your own free will, and without being the result of any threats, coercion, or promise of reward, and I advise you further you do have a right as any other citizen of New Jersey has, under our laws, the privilege to refuse to disclose any matter which may tend to incriminate you, and further with full knowledge of this right, if you make a disclosure pertaining to this investigation, you thereby waive this right or privilege with refrerence to any phase of this investigation that might involve you. Do you understand that? Answer, Yes sir. Question, Understanding that, you are willing to be interrogated? Answer, Yes sir." (R. 13(2) 363).

Mr. Elwell testified in detail as to the disposition of the altered tickets and the fines therefor (R.13(2) 363-371).

6. Donald Murray (R. 13(2) 355, 356)

"Q. [By Mr. Rigg]: Mr. Murray, as you know, I am working a Supreme Court order issued on the 30th of June, 1961, directing me to investigate certain irregularities in the handling of municipal traf-

fic matters in the Court, and by various members of the police department in Barrington. It is pursuant to that order that I ask you to come in here today and ask you questions. Before I do, I want to advise you that anything you say must be voluntary, and of your own free will, without any coercion or threat of promise or reward. I want to advise you also anything you say may be used against you or any person in any subsequent criminal proceeding in our courts in New Jersey. You do have a privilege to refuse to disclose any matters which you feel would tend to incriminate you. However, being aware of that, and if you make a disclosure, you waive that privilege or right, in relation to any matters pertaining to this investigation, there is one limitation of your privilege to the event (sic) that a proceeding may be brought against you under the laws of our state as a police officer, to have you removed from office if you refuse to answer my questions put to you pertaining to your official duties. Understanding this, Mr. Murray, do you wish to proceed this morning and answer the questions I put to you? A. Yes."

Murray testified that he was aware of the practice of altering tickets and had done so himself in "hardship" cases and possibly for a friend (R. 13(2) 356). He stated that he had neither received anything for altering a ticket nor altered without the defendant's knowledge (R. 13(2) 357).

Officer Murray was questioned by Assistant Prosecutor Kaplan in December, 1962. Mr. Kaplan's statement is as follows:

> "Question, * * * I want to advise you anything you say to me must be of course, of your own free will, and of course, without any threats, coercion or promise of reward. I'll advise you further that you do have, as every citizen has under the laws of New Jersey, the privilege to refuse to disclose any matter which may tend to incriminate you, and further with full knowledge of this, if you make any disclosure pertaining to this investigation, you thereby waive this right of privilege with respect to this investigation which might involve you. Are you willing to waive any immunity and proceeding to the questioning? Answer, Yes sir." (R. 13(2) 371).

He testified that the practice in Barrington was to have another officer change one of his (Murray's) tickets and vice versa (R. 13(2) 372-373). At the conclusion of his remarks, he stated that he was not coerced, mistreated or compelled to testify. He also said that he had come down after conferring with counsel (R. 13(2) 377).

c. The Trial

Both trials were held in the Camden County Court in 1963. The unreported decisions of that court appear in R. 13(1) 11 and R. 13(2) 336.

During the trial, the prosecution offered into evidence the statements of each defendant. The defense counsel objected to the statements on the grounds that they were not voluntary. Th court rejected defense counsel's objections and ruled that the statements were voluntarily given and admitted them into evidence (R. 13(1) 16-23, 28; R. 13(2) 338-343).

In both cases, the defendants testified in their own behalf, and gave testimony consistent with that introduced through their own statements.

Mrs. Naglee testified that she had altered tickets (R. 13(1) 250). She stated that the alterations were made in the ordinary course of the business day (R. (1) 237) at the request of Chief Garrity (R. 13(1) 251). Mrs. Naglee did not think there was anything wrong or improper about her changing the tickets (R. 13(1) 242).

Officer Virtue, in his testimony (R. 13(1) 256-277) enumerated the instances wherein tickets were altered. In one case, the change was motivated by a desire to give a girl a break inasmuch as she had two small children and her husband had left her (R. 13(1) 259). In another instance, a truck driver with six children was given a break (R. 13(1) 260). Other alterations were made because the officer felt there was insufficient evidence to support a charge of drunken driving (R. 13(1) 257). Virtue indicated that Chief Garrity was consulted on each alteration (R. 13(1) 261).

Chief Garrity's testimony (R. 13(1) 277-286; 288-311) was largely concerned with "donations" made to the police department by offenders. He testified that he went over the changes with the other officer (Virtue) before the changes were made (R. 13(1) 281). Hardship and the fact of not wanting to put a man out of work were the reasons Garrity advanced for the alterations (R. 13(1) 300, 302).

Officer Elwell's testimony (R. 13(2) 385-474) indicated that he thought nothing wrong of his altering tickets (R. 13(2) 404). He stated that changes were made when he later thought that he shouldn't have issued the ticket in the first place (R. 13(2) 401).

Lt. Holroyd indicated in his testimony (R. 13(2) 515-528) that it was the procedure, in the alteration of tickets, for the officer to go to the issuing officer to ask him if he would give the defendant a break (R. 13(2) 520). Much of Officer Murray's testimony (R. 13(2) 474-515) concerned the procedure for notation and disposition of fine payments. He also admitted to altering tickets (R. 13(2) 492).

The appellants were all found guilty as charged (R. 13(1) 312-313, 13(2) 552).

d. Opinions in the New Jersey Supreme Court

Appeals were filed by the appellants, and while these were pending in the Appellate Division of the Superior Court of New Jersey, the Supreme Court of New Jersey certified the matter on its own motion before argument in the Appellate Division (in both cases) (R. 13(1) 317; R. 13(2) 554).

The New Jersey Supreme Court heard the appeals in two separate cases: *State of New Jersey* v. *Naglee, et al.*, 44 N. J. 209, 207 A. 2d 689, reproduced at R. 13(1) 316-330 and *State of New Jersey* v. *Holroyd, et al.*, 44 N. J. 259, 208 A. 2d 146 reproduced at R. 13(2) 553-558.

Since the decision in the *Holroyd* case on the question presented was based on the reasoning of the *Naglee* case (R. 13(2) 557) only the *Naglee* case will be discussed herein.

The Court set down the test for voluntariness as being a consideration of the totality of the circumstances to determine whether the declarants were rendered incapable of freely exercising their wills (R. 13(1) 321, 322). In applying this test to the facts of the case, the Court could find no such physical or mental coercion (R. 13(2) 323).

On the contention that the Deputy Attorney General's mention of the possibility of employment forfeiture constituted a "threat", the Court said that the statute was not referred to in that the advice merely consisted of the possibility of being subjected to proceedings for removal. The court went on to state that a police officer refusing to cooperate in a proper investigation is acting inconsistent with his police duties and may therefore be subject to subsequent dismissal proceedings. A discharge based upon such refusal to cooperate is not predicated upon inference of guilt but upon the failure to cooperate (R. 13(1) 324, 325).

The Court further held that the defendants were in no position to challenge the constitutionality of the statute (N.J.S. 2A:81-17.1) since the statute's invocation was not expressly threatened, and because such a dismissal would be proper even in the absence of such a statute (R. 13(1) 327).

Concluding on the arguments raised in the appeal, the Court held that while the State cannot require an employee to forego the exercise of a constitutional right, it is reasonable for the state, in a proper proceeding, to dismiss a police officer for refusal to answer questions pertaining to his official position in an investigation such as the one conducted here (R. 13(1) 327-328).

In the *Naglee* case, the defendants further contended that the statements were involuntary because neither Mr. Rigg nor Mr. Kaplan advised them of their right to counsel* (R. 13(1) 326). (This issue is not raised on this appeal.) The court considered this an element bearing on

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* In the *Holroyd* case, the defendants gave their statements in the presence of their lawyer (R. 13(2) 558).

voluntariness but concluded that since the defendants were law officers and aware of their rights and since there was no suggestion that counsel would have been denied if requested, that it did not render their statements involuntary. Further, Chief Garrity told Mr. Rigg that he had arranged for counsel, but he didn't think it necessary at this point (R. 13(1) 326).

The Question of Jurisdiction

This Court reserved the question of jurisdiction of this appeal. 383 U. S. 941. The question of appeal jurisdiction must, therefore, now be treated. See Rule 16(4) of this Court's rules. The appeal jurisdiction invoked by the appellants, 28 U. S. C. A. §1257(2) (1966) provides as follows:

> "By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Appellants point out correctly that for appeal jurisdiction to lodge it must appear (1) that the federal constitutional validity of a state statute must have been drawn in question in the court below, and (2) that the decision below must necessarily have involved an adverse resolution of the constitutional issue (Ab19-20).

These ingredients are not present in the present proceedings. No question has been raised or resolved concerning the constitutional validity of a state statute, i.e., N.J.S. 2A:81-17.1, N.J.S.A. (Supp. 1965). But, to the extent that the state statute was indirectly—even remotely—involved, the court's interpretation of the laws of the state comports with federal constitutional standards.

In this appeal there is *not* involved any question pertaining to the removal, dismissal or discipline of any of the appellants by virtue of the New Jersey statute, N.J.S. 2A:81-17.1, *supra*. The New Jersey Supreme Court in the decision below found correctly and accurately that the statute challenged had not been invoked and its application was not in issue. *State* v. *Naglee*, 44 N. J. 209, 223, 207 A. 2d 689 (1965).

Appellants assert, however, that the New Jersey statute was indirectly involved. The indirect use of the New Jersey statute is said to inhere in advice given by the Deputy Attorney General in the course of his questioning of the appellants in an official proceeding relating to their public offices. The statute was never mentioned. Moreover, the advice given was not in the terms of or according to the literal provisions of the statute. It does not matter what was in the mind of the Deputy Attorney General propounding these questions. What does matter is what he said to the appellants. And, what he stated to them was *not* the terms or literal effect of the New Jersey statute, but rather the effect of New Jersey law in general with respect to the obligations of a public employee to cooperate with law enforcement authorities in connection with official proceedings relating to their offices.

Even if it be assumed that the advice given to appellants is derived from the New Jersey statute, it is clear that this statement of law would not violate the Federal Constitution. The interpretation of the New Jersey law by the court below comports with due process standards. Thus, the New Jersey Supreme Court determined specifically that it is the law in the State of New Jersey that a public employee may not be dismissed summarily or automatically as a result of his reliance upon the privilege

against self-incrimination or by an inference of guilt drawn from the privilege against self-incrimination, but that he may be dismissed or removed from office in an appropriate proceeding for his failure or refual to testify where this failure or refusal imply rather a lack of fitness for office. (See Point I, B, *infra*.) To the extent that the New Jersey statute is in any way involved, it has been thus interpreted by the New Jersey Supreme Court, and this interpretation demonstrates its constitutional validity under federal standards. The construction of the New Jersey Supreme Court should be recognized by this Court. *Nelson* v. *County of Los Angeles*, 362 U. S. 1. Appellants' efforts, therefore, to characterize the New Jersey statute as being unconstitutional disregard the State court's contrary determination of the New Jersey law and should not be given credence by this Court as a basis for appeal jurisdiction. *Anonymous* v. *Baker*, 360 U. S. 287; *Lerner* v. *Casey*, 357 U. S. 468.

By virtue of 28 U. S. C. A. §2103 (1959), appeal from a State court improvidently taken may be regarded as a writ of certiorari. Rule 19 of the Rules of the United States Supreme Court, 28 U. S. C. A. (Supp. 1965) provide a guideline for the exercise of review on certiorari:

> "A review on a writ of certiorari is not a matter of right, but of sound juridical discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) where a state court has decided a Federal question of substance not theretofore determined by this court, or has decided it in a way

probably not in accord with applicable decisions of this Court."

Cf. Rice v. *Sioux City Memorial Park Cemetery,* 349 U. S. 70, 38.

The questions presented on this appeal are neither unique nor of special importance. Similar issues have been considered in other cases. *Regan* v. *New York,* 349 U. S. 58; *Stevens* v. *Marks,* 383 U. S. 234; *cf. Slochower* v. *Board of Education,* 350 U. S. 551.

In the *Regan* and *Stevens* cases, *supra,* this Court considered situations comparable to the instant case without questioning the underlying power of a state to dismiss an officer upon his refusal to testify concerning his official duties.

In *Slochower,* the court struck down a dismissal on the grounds that the inquiry at which Slochower relied on his privilege against self-incrimination to remain silent was not connected with his official duties and was summary in nature. Had the inquiry been in connection with his official duties, or had there been a hearing or opportunity to be heard, there would have been no objection. A dismissal based on lack of fitness for office evidenced by refusal to testify may be proper. *Nelson* v. *County of Los Angeles, supra; Lerner* v. *Casey, supra.* In the instant case the investigation was *solely* concerned with the conduct of official duties, and the New Jersey Supreme Court made it clear that dismissal in such circumstances cannot be automatic.

Since the inherent power of a state to discharge upon failure to so testify is neither a novel question in this court, nor in conflict with any decision of this court, the court should decline to entertain the petition of certiorari.

The appellants in their brief (Ab28) raise questions as to the voluntariness of the statements. Reference is made to *Miranda* v. *Arizona*, 384 U. S. 436, among other cases. These cases deal with the problems of incommunicado interrogation in custodial situations and prescribe the safeguards necessary for a meaningful protection of the privilege against self-incrimination. They are factually remote from the present case.

The facts of the instant case demonstrate that the atmosphere of the investigation was conducted with full candor and fairness. Each defendant was fully apprised of his rights and privileges. It is ironic that the appellants' main contention of involuntariness is the fact that they were fully apprised of their legal status—the very mandate of this Court.

Inasmuch as there exists no novel question of law, no suspicious or ominous pattern of official interrogation, no conflict of authorities, and this Court's highest standards of disclosure were adhered to, there is no sound reason for this Court to exercise its certiorari jurisdiction.

Summary of Argument

In these consolidated cases the appellants have been convicted under N.J.S. 2A:98-1 for conspiracy to pervert and obstruct the due administration of the Motor Vehicle Traffic Laws of the State of New Jersey. The gravamen of the crime was "ticket fixing". All of the appellants at the time of the alleged commission of the crime were police officers employed by New Jersey municipalities. One of the defendants, Helen Naglee, now deceased, was a violations clerk. In official investigations preceding their indictments each of the appellants made incriminating statements. In making these statements initially the appellants

were advised of their privilege against self-incrimination, that their testimony must be voluntary and that it could be used against them. They were also advised that as public officials their failure to testify could subject them to proceedings for removal from public employment. Three of the six appellants had counsel present; one had previously conferred with counsel; none were denied an opportunity to retain counsel and none now raise any question relating to the right of counsel.

At a subsequent stage of this official investigation, more than one year later, appellants were again questioned. They gave similar testimony with respect to their "ticket fixing" activities after being advised of their right to invoke the privilege against self-incrimination; but they were not at this time told specifically of the possibility of their being subject to removal proceedings for failure to testify. At the trial itself appellants voluntarily took the stand and testified with respect to the circumstances of the crimes involved. Their testimony at the trial was also incriminatory.

By way of argument, several points are developed. It is recognized that public employees, involved in law enforcement and in the prosecution of the criminal laws undertake the performance of their public duties subject to the highest standards of conduct. A State has the prerogative in the exercise of its police powers for the protection of society to impose reasonable restrictions and conditions for the holding of public office.

A public employee, such as a police officer, intimately involved in the day-to-day administration of the criminal laws, has a duty and obligation to cooperate with law enforcement authorities. The duties of a police officer entail the obligation to testify fully and frankly as to matters

pertaining to his office or official activities in connection with official proceedings.

Public officials, such as police officers, enjoy in common with all individuals federal and state constitutional rights. For this reason, a public employee may not, consistent with due process, be summarily or automatically removed from office based solely upon an inference of guilt derived from a refusal to testify under the Fifth Amendment in official proceedings. Such employee may, nevertheless, be removed from office or suffer other civil penalties where his refusal to testify evidences a lack of fitness for the holding of public office. Such removal, under appropriate circumstances, is within the sound discretion of the State and does not involve a denial of due process or the impairment of constitutional rights.

The laws of the State of New Jersey applicable to public employees, and to police officers in particular, are consistent with these established principles. Numerous decisions in the State of New Jersey recognize that police officers are subject to the most scrupulous standards of personal and official conduct. Implicit in their obligations is the duty to cooperate fully with law enforcement authorities. This includes a duty on the part of a policeman to testify frankly and completely in an official proceeding inquiring into his office or activities. Under New Jersey laws, a police officer failing in such duty may be subject to removal from office; such removal may occur only in an appropriate proceeding for that purpose and may be based, not upon an inference of guilt with respect to the subject matter of the investigation, but only upon his lack of fitness to be a police officer because of his refusal to cooperate.

A local police officer, who is asked to testify in an investigation of his office and official activities and is fully advised that he has a constitutional privilege to refuse to testify, that if he testifies he must do so freely and voluntarily and that any testimony he gives may be used against him or any other person in a criminal proceeding, may also be informed that a failure to testify could subject him to proceedings for discharge or removal from office. Such advice given freely and openly, where the individual has retained counsel or has been given the opportunity to obtain counsel, does not carry with it any inherent element of threat or coercion. If, therefore, testimony is given voluntarily by a police officer in such proceedings, it may be used in a criminal proceeding in which he is a defendant.

In the final analysis the inquiry must turn upon whether in point of fact self-incriminating testimony is voluntary and not the result of an intimidated or overborn will. The record in these appeals demonstrates convincingly that the appellants testified voluntarily with complete comprehension of their legal rights. The advice which they originally received in the course of their questioning carried with it no inherent threat. The manner of questioning was eminently fair. The appellants understood that their testimony must be volitional. They had the benefit of counsel or the opportunity to obtain counsel. Subsequently, in the course of this same investigation and at their trial the appellants again testified freely without any threats or coercion. Under the totality of the circumstances it appears convincingly that the appellants' testimony in the proceedings below was voluntary and its admission into evidence did not constitute a denial of due process under the Fourteenth Amendment.

It is further argued that the proceedings below resulting in the convictions of the several appellants did not in-

volve a deprivation of due process under the Fourteenth Amendment to the United States Constitution by virtue of the fact that the highest court of the State of New Jersey intiated the original investigations into the appellants' activities. The Supreme Court of New Jersey has jurisdiction over and responsibility for the administration of the state judiciary. This entails the supervision of the judicial machinery of the State and in particular, the conduct of the local criminal courts and the issuance and disposition of traffic tickets. The actions of a State court in policing the internal administration of its court system does not, without more, disqualify it from acting judicially in reviewing criminal convictions where there has been complete adherence to all of the due process rules of criminal procedure. Moreover, there is no factual basis whatsoever that the New Jersey Supreme Court because it initiated an investigation into the municipal courts of which the appellants were officers that it was prejudiced or biased in its judicial review of the resultant convictions.

The appellants have not in any of the proceedings below raised an objection that there was a denial of fundamental due process because the New Jersey Supreme Court initiated the original investigation. They cannot, for the first time on this appeal, raise this issue.

ARGUMENT

POINT I

Testimony of a police officer given voluntarily in an official investigation relating to his duties, after he has been fully apprised that he can refuse to testify, that his testimony must be of his own free will, that his testimony could be used against him in a criminal proceeding and that his refusal to testify might subject him to removal from office in a proper proceeding, is admissible in a criminal proceeding in which he is a defendant and does not result in a denial of the privilege against self-incrimination under the Fourteenth Amendment.

A. A police officer is subject to strict standards of conduct and is under a solemn duty to enforce the criminal laws and to cooperate fully in the administration of justice.

The individual appellants in each of these consolidated cases were, at the time of their respective convictions, public employees intimately and vitally associated with the enforcement of state and local criminal laws. The appellants, Holroyd, Elwell and Murray, were all members of the Police Department of Barrington, N. J. Holroyd was a police lieutenant; Elwell and Murray were patrolmen and at one time or another had served in the position of violations clerk for the local municipal court. The appellants, Garrity, Virtue and Naglee (now deceased), were similarly employed by the municipality of Bellmawr, N. J. at the time of the alleged commission of the crimes for which they were convicted. Garrity was the Chief of Police, Virtue was a police detective, and Mrs. Naglee was the municipal court or violations clerk.

There is no position in public employment more directly related to the safety and welfare of society than that of the local police. Local police, in a most vital sense, occupy a position of singular responsibility for the enforcement of the criminal laws and the administration of justice on behalf of society.

The State of New Jersey, as a matter of its public policy and in the exercise of its police powers for the protection of its citizens, has imposed upon police officers the highest standards of personal and official conduct. In *Moorestown Tp.* v. *Armstrong,* 89 N. J. Super. 560, 566, 215 A. 2d 775, 778 (App. Div. 1965), *cert. den.* 47 N. J. 80, 219 A. 2d 417 (1966) it was stated:

> "It must be recognized that a police officer is a special kind of public employee. His primary duty is to enforce and uphold the law. He * * * is constantly called upon to exercise tact, restraint and good judgment in his relationship with the public. He represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public, * * *."

In *In re Emmons,* 63 N. J. Super. 136, 141, 164 A. 2d 184, 187 (App. Div. 1960) it was stated:

> "An officer cannot complain that he is being held up as a model of proper conduct; it is one of the obligations he undertakes on voluntary entry to the public service. His obligations are greater if he desires to maintain his position as a police officer."

And in an earlier case, *Martin* v. *Smith,* 100 N. J. L. 50, 52, 125 Atl. 142, 143 (Sup. Ct. 1924):

> "The police department of our cities, however, is built upon a plane of public efficiency, which has ordinary truth and morality as its face, and when these essentials of public probity be lost, the department shall have lost not only the confidence of the community, but the fundamental mainstay and support which is necessary to its effective and satisfactory operation."

A police officer occupies a unique position in society and stands in the public eye as an upholder of that which is morally and legally correct. He is not free to engage in any conduct which tends to reflect adversely upon and impair the morale and discipline of the police force even though not related directly to the performance of his official duties. *In re Cohen,* 56 N. J. Super. 502, 507, 153 A. 2d 708, 711 (App. Div. 1959); *Herbert* v. *Atlantic City,* 87 N. J. L. 98, 101, 93 Atl. 80, 81 (Sup. Ct. 1915). It is not surprising, therefore, to find that conviction of a police officer for downgrading and altering traffic tickets is inconsistent with "honorable service" and may result in the forfeiture of pension rights. *Fromm* v. *Bd. Directors of Police, etc., Retire. Syst.,* 81 N. J. Super. 138, 195 A. 2d 32 (App. Div. 1963).

These decisions and principles are not unique to New Jersey. There has been universal recognition of the proposition that the police officer occupies a special and critical status in society, and the obligations of his office reflect the importance of this trust. In the landmark decision of *McAuliffe* v. *City of New Bedford,* 155 Mass. 216, 29 N. E. 517 (1892), the court recognized that policemen must forego certain ordinary political rights in order to retain their jobs. The right of a policeman seeking funds for political purposes, it was said, might lead to an impairment of his

effectiveness as a police officer because the public trust vested in him would be lessened. The court through Holmes, *J.*, stated at 29 N. E. at 517:

> "The petitioner may have a constitutional right to talk politics but he has no constitutional right to be a policeman * * * [T]he city may impose any reasonable condition upon holding office within its control. This condition seems to us reasonable."

The regulation of public employees to assure the proper discharge of their trust is a matter of state responsibility. The states may impose reasonable restrictions upon individuals in public employment not otherwise applicable to private citizens. "The terms and conditions of public service in office or employment rest in legislative policy * * *." *Spina* v. *Consolidated Police, etc., Pension Fund Com.*, 41 N. J. 391, 400, 197 A. 2d 169, 173 (1964). The restrictions upon individuals in public employment may well result in the curtailment of ordinary rights where the pursuit of these rights is inconsistent with the discharge of official duties or detrimental to the public weal. In *United Public Workers* v. *Mitchell*, 330 U. S. 75, for example, the dismissal of federal civil service employees for violation of the Hatch Act by engaging in political activity was upheld. The court said that the Bill of Rights is not absolute and that Congress can within reason regulate government employees. Congress has the power to shield the public from the potential danger of partisan political activities by public employees. Public employees have a special status—a public trust—which requires them to refrain from exercising certain of their political rights. *Pfitzinger* v. *United States Civil Service Commission*, 96 F. Supp. 1, 3 (D. C. N. J. 1951), *aff'd* 192 F. 2d 934 (3rd Cir. 1951); *McAuliffe* v. *City of New Bedford, supra.*

It cannot be overemphasized that public employment is a privilege in the nature of a trust. Public employees function as the servants of the people and they may, therefore, be required to perform their duties under the highest ethical standards of official and personal conduct. It is within the discretion of the states, in the exercise of their police powers, to formulate and apply these standards. Especially is this true of police officers performing the vital, difficult and indispensable task of enforcing and administering the criminal laws.

B. A police officer has the duty to testify fully and frankly in official proceedings relating to his office and his failure to so cooperate, in appropriate circumstances, reflects a lack of fitness for public office, is inconsistent with his public duties and constitutes a justifiable basis for his removal in proper proceedings.

1. General principles

The privilege against self-incrimination, sacred as it is, does not stand as an insurmountable obstacle to the reasonable regulation of individuals invested with a public trust or enjoying special privileges granted by government. Government, both federal and state, is competent to condition the exercise or enjoyment of special privileges upon the curtailment or limitation of the privilege against self-incrimination. *E.g. Maryland* v. *Soper,* 270 U. S. 9 (the right to invoke the protection of federal statutes to allow a federal officer to be tried in a federal court for a state offense entails abandonment of right to refuse to testify); *Kaufman* v. *Hurwitz,* 176 F. 2d 210 (4th Cir. 1949) (a discharge in bankruptcy may be withheld where debtor invokes privilege against self-incrimination); *Shapiro* v. *United States,* 335 U. S. 1, (a person required to keep records may not withhold their production under the privi-

lege against self-incrimination); *Orloff* v. *Willoughby*, 345 U. S. 83, *rehearing den.* 345 U. S. 931 (a medical doctor may be refused a military commission otherwise provided by special statute if he has invoked the privilege against self-incrimination); *Cohen* v. *Hurley*, 366 U. S. 117 (an attorney who relied upon the privilege against self-incrimination in a disciplinary hearing could be disbarred under state constitutional standards where the disbarment order was predicated not upon any unfavorable inference drawn from petitioner's assertion of the privilege nor upon any purpose to penalize him for its exercise, but solely upon his refusal to discharge obligations which, as a lawyer, he owed to the court); *In the Matter of Spevack*, 16 N. Y. 2d 1048, 213 N. E. 2d 457 (1965), *remittitur amended*, 17 N. Y. 2d 490, 214 N. E. 2d 373 (1966), *cert. granted* 383 U. S. 942 (No. 944, 1965 Term; renumbered No. 62, 1966 Term) (under the Fifth Amendment, made applicable by the Fourteenth Amendment in *Malloy* v. *Hogan*, 378 U. S. 1, an attorney could be disbarred for refusal to testify and produce records in a professional proceeding, the court stating: "[A]n attorney, like any other citizen had an absolute right to invoke his constitutional privilege against self-incrimination and to refuse to supply pertinent information, but that, when he did so, he failed in his inherent duty to the court to divulge all pertinent information necessary to show his character and fitness to remain a member of the Bar and necessary to proper administration of justice and must therefore forfeit his privilege to remain a member of the Bar." 214 N. E. 2d 373); *cf. United Electrical Radio & M. Wkrs.* v. *General Elec. Co.*, 127 F. Supp. 934 (1954), affirmed in part and reversed in part on other grounds, 231 F. 2d 259 (D. C. Cir. 1956), *cert. den.* 352 U. S. 872.

Where the special privilege granted by the state involves the holding of public office, the state's power to condition this upon the curtailment of the privilege against self-incrimination in appropriate circumstances is even more compelling. Many states have articulated this policy by specific statutory enactments. *E.g.*, N.J.S. 2A:81-17.1, N.J. S.A., (Supp. 1965) (New Jersey); N. Y. Const. Art. 1, §6 (Supp. 1965) (New York); New York City Charter, §1123 (1963); La. Const. Art. 14, §15 (P)(1) (1955) (Louisiana); D. C. Code §1-319a (Supp. 1961) (District of Columbia); Cal. Ann. Code, §18676-7 (1945) (California); Revised Laws of Hawaii, 1 §5-4 (1955); Md. Ann. Code, 69 §11 (1957) (Maryland); V. A. M. S. §36.410 (1951) (Missouri); 5 U.S.C. §2283 (1965) (United States). It is a policy founded upon the trust which must necessarily be reposed in public officials.

> "Surely nothing can be more self-evident than that he who accepts a public trust should be ready at all times to welcome the fullest investigation of his official conduct and to give to the authorized investigator his fullest cooperation." Mayers, *Shall We Amend The Fifth Amendment* 151-152 (1959).

It is well within the power of a state to remove, dismiss or otherwise discipline a public employee for failure to testify in response to questions in the course of official investigations relating to the conduct of the public office or the performance of official business where such refusal or failure bespeaks of a want of capacity or a lack of fitness for public office. *Beilan* v. *Board of Education*, 357 U. S. 399; *Lerner* v. *Casey, supra; Nelson* v. *County of Los Angeles, supra; cf. United States* v. *Warden of Wallhill Prison*, 246 F. Supp. 72 (S. D. N. Y. 1965), aff'd *per curiam* 355 F. 2d 208 (2d Cir. 1966).

The inherent prerogative of a state to assure scrupulous conduct by its employees is particularly manifest with respect to police officers and law enforcement officials. Clearly implicit in the obligations of police officers is the duty, when called upon in connection with investigations, inquiries or official proceedings related to their offices or to their official activities, to testify fully and frankly. Anything short of complete candor on the part of policemen is inconsistent with their duty to be above reproach or suspicion in the enforcement of the criminal laws, is inimical to their public trust and subversive of the confidence reposed in them by society.

Numerous decisions illustrate this. In *Callahan* v. *New Orleans Police Dept.*, 171 So. 2d 730 (La. Ct. App. 1965), the appellant was suspended and later dismissed from employment with the New Orleans Police Department. The letter of dismissal set forth in detail a number of specific charges including several charges of acceptance of "payoff" money. At his hearing appellant refused to testify. The court upheld validity of La. Const. Art. 14 §15(P)(1) under the Federal Constitution. It stated:

> "The paramount interest of the public in the area of law enforcement is so obvious that further comment seems unnecessary. A police officer who refuses to cooperate with the proper authority of the city by which he is employed; who refuses to give information within his knowledge; or who impedes or hinders the inquiry by the proper authorities into violations of the law which he has sworn to uphold and defend, is no longer of any value to the city as a police officer. Any law which declares and renders such officer disqualified from continuation in public service is within the limits of the reasonable

exercise of the police, power of the State and not violative of due process (Citation omitted.)

> "Sergeant Callahan has no inalienable right to employment as a police officer; hence the paramount right of the people of the City of New Orleans to protection against law violation far transcends any right Callahan has to employment in a position, for which, by his actions, he has demonstrated his unfitness and disqualification." 171 So. 2d at 737. Also, *Fallon* v. *New Orleans Police Dept.*, 238 La. 531, 115 So. 2d 844 (1959).

In a recent California case, the court upheld the dismissal of state police officers who refused to take a polygraph test which they were asked to take in the court of an investigation of their official conduct. *Fichera* v. *State Personnel Board,* 217 Cal. App. 2d 613, 32 Cal. Rptr. 159 (Dist. Ct. of App. 1963). The court said that although the results of the polygraph test could not be admissible as evidence, it could have been used as an aid to channel the investigation. By not undergoing the test the police violated their public trust. The court, reasoning from earlier decisions, explained the reason for their dismissal:

> "* * * [T]he basis was the need for confidence of the public in officers who have sworn to uphold and enforce the laws, which require officers, under certain circumstances, to risk self-incrimination, not in defense of accusation of criminal conduct, but in the course of maintaining their positions." 32 Cal. Rptr. at 163.

Similarly, in *Christal* v. *Police Commission,* 33 Cal. App. 2d 564, 92 P. 2d 416 (Dist. Ct. of App. 1939), police officers refused to answer questions before a grand jury con-

ducting an investigation to determine whether such officers had been guilty of criminal activities in connection with their duties. The court held that the officers' conduct was inconsistent with the duties of their office and constituted "cause" for dismissal as well as "conduct unbecoming an officer." The dismissal of police officers on the ground of conduct unbecoming an officer based on the officers' refusal to sign immunity waivers when they were called before a grand jury in connection with a suspected conspiracy to obtain an unfounded indictment of certain persons for murder was also upheld in *Drury* v. *Hurley,* 339 Ill. App. 33, 88 N. E. 2d 728 (1949), *cert. den.* 339 U. S. 983. This decision was followed in *Moretti* v. *Civil Service Bd.,* 2 Ill. App. 2d 89, 118 N. E. 2d 615 (1954). Also, *Souder* v. *Philadelphia,* 305 Pa. 1, 156 A. 245 (1931); *Miami* v. *Jervis,* 139 So. 2d 513 (Fla. D. S. A. 1962); *Canteline* v. *McClellan,* 282 N. Y. 166, 25 N. E. 2d 972 (Ct. App. 1940); *Scholl* v. *Bell,* 125 Ky. 750, 102 S. W. 248 (Ct. App. 1907).

Slochower v. *Board of Public Educ., supra,* and *Steinberg* v. *United States,* 163 F. Supp. 590 (Ct. Cl. 1958), relied upon by appellants, do not represent a contrary doctrine. They articulate a refinement, however, with respect to the manner in which government can discipline or dismiss public employees. In *Slochower* it was held only that the *summary* dismissal without a hearing of a New York City teacher for invoking the Fifth Amendment before a federal committee was arbitrary and lacking in due process. In *Steinberg* the court felt that it was an arbitrary assertion of legislative power to withdraw the annuity of a retired employee under 5 U.S.C.A. §2283 for merely availing himself of the privilege against self-incrimination. But see, Note, 27 *Geor. Wash. L. Rev.* 382, 387 (1958).

These decisions chart a perimeter within which a state must confine its disciplinary powers over its public em-

ployees. What falls beyond this due process boundary is an arbitrary or capricious dismissal, evidenced by the automatic or summary removal from office without a hearing or appropriate opportunity to be heard, where the only factor present is a refusal to testify and an inference of guilt drawn from this bare refusal. *Gardner* v. *Murphy*, 46 Misc. 2d 728, 260 N. Y. S. 2d 739 (Sup. Ct. Spec. T. 1965); *Conlon* v. *Murphy*, 24 A. D. 2d 737, 263 N. Y. S. 2d 360 (1965). In *Koutnik* v. *Murphy*, 25 A. D. 2d 197, 268 N. Y. S. 2d 265 (1966), however, the court stated that under certain circumstances a discharge without a hearing may not be arbitrary. ("Surely if expedition is anywhere advisable it is where those who have been entrusted with the protection of the flock take the side of the wolves", 268 N. Y. S. 2d at 267.)

This Court itself has recognized that *Slochower* does not deprive the states of their inherent power to discipline public employees where the refusal or failure to testify reflects a lack of fitness for office. *Beilan* v. *Board of Education, supra*. *Lerner* v. *Casey, supra*, involved the dismissal of a Transit Authority policeman who used the Fifth Amendment when questioned by his employer. The policeman was advised that he might lose his job if he continued to rely on his Fifth Amendment privilege. The Court noted that the dismissal was predicated on the impairment of his trust and reliability based on lack of candor in refusing to answer questions relevant to his job put to him by his employer. This doubt justified his dismissal independently of the petitioner's reason for silence. In *Nelson* v. *County of Los Angeles, supra*, this court upheld the dismissal of state social workers who had refused to answer questions before a congressional sub-committee after having been requested to do so by their superiors. The petitioner therein argued that his discharge was sum-

mary and based upon an invocation of his rights under the First and Fifth Amendments. The Court distinguished *Slochower* by pointing out that there the discharge of a city employee stemmed from an inference of guilt based upon the use of the Fifth Amendment.

> "But the test here, rather than being the invocation of any constitutional privilege, is the failure of the employee to answer. California has not predicated discharge on any 'built-in' inference of guilt in its statute, but solely on employee insubordination for failure to give information which we have held that the State has a legitimate interest in securing." 362 U. S. at p. 7.

It is thus generally recognized that there is an obligation upon persons in public employment to cooperate completely with government and to testify fully in official proceedings relating to their duties and activities. This obligation is particularly manifest with respect to police officers who hold positions of great public trust. Refusal to cooperate on the part of a police officer is not a crime nor does it imply he has committed a crime. Such conduct, however, is "unbecoming an officer." Ratner, Consequences of Exercising the Privilege Against Self-Incrimination, 24 U. Chi. L. Rev. 472, 503 (1957); Annot., 44 A. L. R. 2d 789 (1955). A state may in appropriate proceedings remove or dismiss such employees who fail to meet these standards and thereby demonstrate unfitness for public office.

2. *The law of the State of New Jersey*

The New Jersey legislature has evinced a specially strong concern with respect to assuring the fullest degree of cooperation and exemplary conduct on the part of public employees in connection with their offices. *E.g.* N.J.S. 2A:81-

17.1, N.J.S.A.; N.J.S.A. 40:69A-167; N.J.S.A., Acts Saved From Repeal, 40:103-5(92).

The purpose of the statutes is to assure the performance of public duties in accordance with the highest ethical standards. This was the explicit intent of the New Jersey legislature in passing N.J.S. 2A:81-17.1. New Jersey Statutes 2A-3A, 1965 Cum. Pocket Part p. 141 (L. 1953, c. 259) (Assembly Bill No. 607).

On their face the New Jersey statutes might appear to require an automatic, mandatory forfeiture of employment upon the refusal of a public employee to testify in an official proceeding relating to his office. If this were the necessary effect of the New Jersey statutes, they might well be suspect under the decisions prohibiting summary dismissals based solely upon an inference of guilt drawn from a refusal to testify. It is for this reason that appellants urge strenuously, but inaccurately, that the New Jersey statute, N.J.S. 2A:81.17.1, N.J.S.A. his this force and effect. It does not.

Preliminarily, it is observed that the New Jersey statute is not involved in these appeals. No issue is presented concerning any discharge, removal or discipline of any of the appellants under the New Jersey statute. The New Jersey Supreme Court considered whether the advice given by the Deputy Attorney General to the appellants in the course of their questioning was a reasonable and accurate statement of the New Jersey law. The Court noted that the statute was neither referred to by name nor quoted, nor even paraphrased. The advice was merely:

> " 'This right or privilege [of refusing to answer on the ground of self-incrimination] that you have is limited to the extent that you as a police officer once sworn and asked questions pertaining to your office

> and your conduct therein, if you refuse to answer, you may then be subject to a proceeding to have you removed from the department.'" 44 N. J. at 221, 207 A. 2d at 693.

The Court then set forth its understanding of the power of a state to discipline an employee where his reliance upon the privilege of self-incrimination is incompatible with his office.

> "As policemen, Garrity and Virtue held sensitive positions in regard to reporting and prosecuting violations of the law. Surely, a police officer who refuses to cooperate in a proper investigation of his official conduct is acting inconsistently with his police duties. He is therefore properly subject to subsequent dismissal proceedings. (Citations omitted.) The obligation to cooperate does not depend on the existence of a statute or rule. It is intrinsic to the position of a police officer. (Citations omitted.) It is to be noted that the above cases recognize the right of a policeman to assert his privilege against self-incrimination; but he may be discharged for doing so. A subsequent discharge is not predicated upon an inference of guilt from the police officer's refusal to testify, but upon his failure to cooperate in a situation where his duty compels cooperation. See the discussion in Ratner, 'Consequences of Exercising the Privilege Against Self-Incrimination,' [*supra*], at pp. 503-504." 44 N. J. at 221-222, 207 A. 2d at 695-696.

Again:

> "The defendants in their brief have made a point which we have not previously discussed. They con-

tend that a public official may not be subjected to a penalty (here the loss of employment) because of the exercise of a legal right (here the constitutional right to refuse to answer questions on the ground that the answers would be self-incriminatory). But there are situations where a public official's right to retain his position may properly depend upon a willingness to forego a constitutional right to the extent that the exercise of such a right may be inconsistent with the performance of the duties of his position. For example, a member of the judiciary of this State cannot engage in partisan political activity.

"The question is not whether the State can require an employee to forego the exercise of the constitutional right. Of course it cannot. The question is whether the State's requirement that a given employee forego a given constitutional right as a condition of continued employment is *reasonable*. We need not now determine whether it would be reasonable for the State, under other circumstances, to dismiss employees holding other public positions because they refuse to answer questions on the ground of self-incrimination. See Ratner, *supra*, at pp. 504-511. We think it reasonable, however, for the State, in a proper proceeding, to dismiss a police officer for refusal to answer questions pertaining to his official position in an investigation such as the one conducted here." 44 N. J. at 223-224, 207 A. 2d at 697.

The New Jersey courts have made it crystal clear that the dismissal or removal of a public employee for a violation of the New Jersey statutes imposing a duty to testify in official proceedings cannot be mandatory or auto-

matic. In an analogous situation, *Newark* v. *Dept. of Civil Service*, 68 N. J. Super. 416, 172 A. 2d 681 (App. Div. 1961), it was held that even though N.J.S.A. 40:69A-167 made it mandatory that a public employee forfeit his office, he could be removed only upon a proper administrative adjudication after due notice and hearing.

The refusal to testify as a basis for removal is not founded upon an inference of guilt but rather upon a lack of fitness for the office.

In *In Appeal of Emmons, supra*, 63 N. J. Super. 136, 164 A. 2d 184, where it was held that the suspension from the police force of a police officer for his failure to submit to a sobriety test or to answer questions regarding his involvement in an automobile accident while off duty did not violate his constitutional due process or his statutory privilege against self-incrimination. The New Jersey court pointed out that the issue was not whether the officer had a right to exercise a constitutional privilege but whether his refusal to cooperate in the investigation was a breach of his public trust. Also, *Laba* v. *Newark Board of Education*, 23 N. J. 364, 129 A. 2d 273 (1957). (A teacher risked dismissal if, during an inquiry into his fitness, he declined to answer pertinent questions.)

It is to be emphasized that, while the New Jersey statute was not involved, the New Jersey Supreme Court's interpretation of the applicable state law should be recognized and accepted by this Court. *Nelson* v. *County of Los Angeles, supra; Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101; *Albertson* v. *Millard*, 345 U. S. 242; *Cramp* v. *Board of Public Instruction*, 368 U. S. 278. In all respects the law in the State of New Jersey comports with the general constitutional principles established in this area. *Nelson* v. *County of Los Angeles, supra.*

The abundance of authority recognizing and confirming the proposition that under appropriate circumstances a public employee may be discharged for invoking the privilege against self-incrimination in response to inquiries relating to his public office is ample testimonial to the efficacy and need for the rule.

> "There is little doubt that the state can dismiss certain types of employees for exercising constitutional privileges where the exercise of such a privilege is incompatible with the duties of the office in question, and it is conceivable that the exercise of the self-incrimination privilege would in some instances be incompatible with certain offices." Note, *Mandatory Dismissal of Public Personnel and the Privilege Against Self-Incrimination.* 101 U. Pa. L. Rev. 1190, 1201 (1953).

This notion does not involve any deprecation of the privilege against self-incrimination. Rather it revolves around the unique status of public employees as the instrumentalities of government against which the privilege against self-incrimination has been created as a protection. The citizen is entitled to the protection of the privilege against an over-zealous or over-reaching government. *Rogers* v. *Richmond,* 365 U. S. 534, 541. But while the public employee who actually effectuates that government's policy may invoke that privilege, his lack of candor in matters official may be shown to be a breach of his public trust in a proper proceeding. It has been suggested as incongruous "when the individual invoking protection against the all powerful state has recently or perhaps still is, himself an agent of that same state, now suspected of abusive power to the injury of his fellow citizens." Mayers, *op. cit. supra* at 166.

Nowhere does this principle of self-government have greater pertinency than with respect to police officers and other public employees intimately involved with the enforcement and administration of the criminal laws.

> "This is a reflection of the view that one who has assumed a public trust should not withhold from other government officials information thought necessary to law enforcement. Furthermore, because public officials are often implicated in crimes which are peculiarly clandestine, their resort to the privilege presents a more serious obstacle to those investigating government corruption." Note, *Denying The Privilege Against Self-Incrimination To Public Officers,* 64 Harv. L. Rev. 987 (1951).

More pointedly,

> "Anybody may keep out of jail by invoking the privilege against self-incrimination. But there are many posts in which we may legitimately require standards of conduct higher than those sufficient to keep out of jail.
>
> "No one ever raised a protest when policemen earning $5,000 a year questioned about the source of the $100,000 they have banked were dismissed from their posts when they invoked the privilege against self-incrimination." Hook, *Common Sense and the Fifth Amendment,* 73 (1957).

The State of New Jersey, in accordance with established doctrine, has imposed strict standards of official and personal conduct on the part of its public employees. Public employees, particularly policemen, under state law are required to cooperate fully with government and to make

frank disclosure when their office or activities have become suspect. It is only to the extent, therefore, that reliance upon the privilege against self-incrimination is or becomes incompatible with the duties of public office that it may be limited or curtailed; and then, only in its application and relationship to persons in public employment. This, it is submitted, is a reasonable, practical and necessary rule dictated by the fundamental need on the part of the government for self-preservation.

C. The advice to a police officer in the course of an official investigation relating to his activities that he has the privilege to refuse to testify, that any testimony he gives must be voluntary and that such testimony may be used against him in a criminal proceeding, coupled with the advice that his failure to testify might result in proceedings for removal, is fair and reasonable and does not constitute a threat or coercion.

It is well established that a police officer has a duty to cooperate with public officials with respect to matters relating to his office or the performance of his official duties. If he fails in this duty by invoking the privilege against self-incrimination in the course of an official investigation, he may be subject to proceedings for his dismissal or removal from office. (Point I, B, *supra.*) What then are the correlative duties which government owes such an officer? It would seem to be a matter of elemental fairness and due process to advise such a public officer, in the course of an official proceeding relating to his office and the performance of his official duties, of the full extent of his legal rights and obligations and the possible consequences of his failure to cooperate and to testify.

The New Jersey Supreme Court was of the opinion that the warning and advice given to the appellants by the

Deputy Attorney General in the course of the official investigation relating to their offices to be accurate, reasonable and fair. It likewise determined that the admission of appellants' testimony into evidence in their criminal trial did not violate their privilege against self-incrimination because their testimony did not issue as the result of any threats or coercion, express or implied from the advice given to them in conjunction with their statements.

The root of the inquiry is whether or not making an individual aware of the choices which confront him as a matter of law and enabling such an individual to make his own choice is tantamount to a threat or force which taints or vitiates his subsequent testimony. With cogency and basic common sense, courts have reasoned to the contrary.

In *United States, ex rel. Carthan* v. *Sheriff, City of New York,* 330 F. 2d 100 (2nd Cir. 1964), *cert. den.* 379 U. S. 929, appellant, a plastering inspector employed by the City of New York, appeared before a grand jury investigating possible corruption in the building department of the City of New York. He executed a limited waiver of immunity pursuant to §1123 of the New York City Charter, which requires a city employee subpoenaed before a grand jury to waive his privilege against self-incrimination with respect to city affairs or forfeit his office. Appellant testified and later submitted financial questionnaires to the grand jury. However, later when subsequently subpoenaed to produce copies of his income tax returns for certain years, he refused. He was adjudged in contempt and sentenced. The sentence was affirmed, the court stating:

> "Appellant knowingly waived his privilege against self-incrimination with respect to city affairs. Unlike Regan, he submitted financial questionnaires. Having taken advantage of the waiver to hold his

> job and having already undertaken to disclose his financial affairs to the Grand Jury, appellant cannot cry halt because the inquiry has gone into greater depth than he had anticipated * * *." 330 F. 2d at 102. *Cf. Stevens* v. *Marks, supra; Regan* v. *New York, supra.*

In *People* v. *Wheatman,* 48 Misc. 2d 85, 264 N. Y. S. 2d 292 (1965) an indictment charging perjury and taking unlawful fees was attacked by defendant on the ground that since he was a public officer at the time of the grand jury investigation, he was in effect required to execute the waiver of immunity against self-incrimination in order to protect his position by virtue of the New York Constitution and the New York City Charter. The court rejected this argument:

> "The act of the defendant in executing the waiver of immunity was a free and voluntary act. There was not compulsion whatever. He had a clear choice. He either could refuse to waive his rights or he could insist upon them. He chose to waive them, and having done so, he was a proper witness before the Grand Jury and could have been compelled to testify." 264 N. Y. S. 2d at 296.

In *United States* v. *Warden of Wallhill Prison, supra,* relator signed a waiver of immunity pursuant to §103-B of the General Municipal Law of New York requiring that public contractors waive immunity before investigative bodies on sanction of possible disqualification from receiving municipal contracts. Later, relator was convicted of the crimes of bribery and grand larceny, part of the conviction resting upon testimony obtained after the execution of the waiver. He challenged the use of this testimony

as being obtained under compulsion and used against him in violation of his privilege against self-incrimination. The court rejected this argument stating:

> "Relator has voluntarily waived his rights in that he signed a waiver of immunity with full realization of its implications and after conferring with counsel. Thus, his waiver was factually voluntary. The statute pursuant to which the waiver was signed is not unconstitutional; thus, the sanction therein set forth does not render the waiver voluntary, nor does putting him to the choice of waiver or possible disqualification constitute an abridgement of his rights without due process of law * * * The fact that relator signed the waiver only because he wanted the contract is a question of subjective state of mind, a calculated decision that he took after conferring with counsel * * *." 246 F. Supp. at 99. See *Wirtshafter* v. *Pennsylvania,* 206 Pa. Super. 721, 21 A. 2d 926 (1965), *allocatur den.* Pa. Super. (Pa. Supp. Ct.) 1966, cert. den. 35 U. S. L. Week 3127 (U. S. Oct. 10, 1966) (No. 49 Misc.) but see, *State* v. *Kimberlin,* 246 La. 441, 165 So. 2d 279 (1964) (dictum).

Appellants discount the determination by the New Jersey Supreme Court that there was, in fact, "no physical coercion, no overbearing tactics of psychological persuasion, no lengthy incommunicado detention, and no efforts to humiliate or ridicule the defendants" and that "the interrogation was conducted with a high degree of civility and restraint" (Ab30).

Appellants urge that because they had only "two real alternatives—either to incriminate themselves or to forfeit their public employment" (Ab32), their subsequent testimony was coerced. This was, in their opinion, an "im-

proper choice" (referring to *Frost Trucking Co.* v. *Railroad Commission*, 271 U. S. 583, 593 and *Stevens* v. *Marks*, *supra*, at 243). In effect, appellants assert that "[s]uch a state-imposed choice of evils is the very antithesis of a *free* choice by the individual concerned" (Ab35).

In actuality appellants were not put to the choice of "forfeiting their public office upon the assertion of the privilege against self-incrimination" (Ab35). Their assertion of the privilege merely exposed them to the possibility of removal from office. *This* is what they were told and, in accordance with New Jersey law, all that this could mean was that if an assertion of the privilege was incompatible with their duty as police officers then, in an appropriate proceeding with full opportunity to be heard and to explain their conduct, they might be removed or otherwise disciplined. Thus, the so-called "improper choice" is one which appellants now fabricate. It is not one which actually occurred.

There is no doubt that the facts pertaining to appellant's testimony herein fall within the purview of *Carthan, Wheatman and Warden of Wallhill Prison, supra*. For one thing, some of the appellants had counsel at the time of their initial questioning by the Deputy Attorney General. Some had conferred with counsel. All had the opportunity to obtain counsel. There can be no contention that the appellants did not clearly understand and comprehend the meaning and purport of the advice given to them preliminary to their questioning. They were questioned in an open, fair and constrained manner. There was no official badgering or fulminating in the course of the questioning. They were told specifically and clearly that their testimony must be voluntary, of their own free will and choosing without any threats or coercion. This they understood.

They were specifically told that they had the right or privilege to refuse to testify. This they understood. They were told that if they did testify their testimony, if incriminating, could be used in subsequent criminal proceedings against them or other persons. This they understood. They were also told that if they refused to testify to the questions put to them in the course of this official investigation, they might subject themselves to a proceeding for removal from office. This was well understood by them as police officers. With this complete and full advice as to their legal rights and obligations the appellants expressed that they were willing and ready to testify. To the extent, therefore, that they waived or forswore their privilege not to testify this waiver was "a free and voluntary act", the result of a "clear choice".

Other facts are deserving of emphasis on the point that the testimony of the appellants was not the product of compulsion or overborne wills. The appellants gave similar testimony to the Camden County Prosecutor in a subsequent phase of the investigation. In the course of this interrogation they were *not* apprised of the consequence that they might be subject to removal or discipline in a proper proceeding for failure to cooperate or to testify. Surely, no inference can be drawn that this omission in the later examination was treacherous or had an adverse impact upon them. Appellants obscure this fact by contending that the previous advice of the Deputy Attorney General in the initial investigation, more than one year before, though not mentioned by the Camden County Prosecutor, in some way carried over with and continued to permeate and overbear their minds. This is sheer speculation and fantasy, a makeweight without factual foundation. Their subsequent testimony was not the result of a "threat" made more than a year ago; it was the result of a deliber-

ate, conscientious decision to cooperate. Indeed, appellants went further in evincing a willingness to testify. They voluntarily took the stand to testify at their trial, this presumably at the direction of counsel. In the course of their freely proffered testimony the appellants make abundantly clear their participation and implication in the crimes for which they were charged.

It is sensibly appreciated that a policy to be subserved by the privilege against self-incrimination and the exclusion of involuntary statements is to enforce civil behavior by police officers. *Rogers* v. *Richmond, supra,* at 541. Here the conduct of the questioners was in every way decent and restrained.

The appellants have in no way suggested factually that they were coerced, threatened or subjected to duress in giving their testimony. The basic test for determining involuntariness is whether, under all circumstances, the defendant's will was overborne and his capacity for self-determination critically impaired. *Culombe* v. *Connecticut,* 367 U. S. 568, 602. *Escobedo* v. *State of Illinois,* 378 U. S. 478; *Miranda* v. *Arizona, supra.* There has been no intimation that appellants would not have testified fully and freely even in the absence of the advice given to them. (The appellant Naglee gave her testimony without the benefit of such advice.) The argument now made on behalf of appellants fails to do them credit. It is apparent from their obvious willingness to cooperate and testify during the course of these entire proceedings that they as police officers conceived that their duty called for a candid and full disclosure of their activities in connection with the charges of ticket fixing; they may have felt that "two wrongs" are infinitely worse than a single wrong. Conceivably nothing was to be gained by their refusal to co-

operate and to make full disclosure. Their testimony, in effect, may have reflected their feelings that they wanted to make amends and in some measure expiate their dereliction. In the totality of the surrounding facts, it strongly appears that the testimony of the appellants throughout these proceedings was volitional. Their current assertion that their testimony was the result of threats, coercion and overbearing is just not plausible.

Under such circumstances there is no violation of the privilege against self-incrimination. Indeed, if the appellants had not been advised with respect to the possibility of their removal from office for failure to testify and they had in fact refused to testify and were thereafter subjected to disciplinary proceedings, they could with some justification urge trickery and deceit on the part of the State. It is not unreasonable, therefore, to advise public employees such as police officers and those who are directly and intimately involved in the actual enforcement and administration of the criminal laws that their duty demands the highest standards of ethical and professional conduct. This duty includes at the very least the obligation to cooperate with law enforcement authorities and to make full disclosure with respect to their offices and the performance of their official duties when these have become suspect. The safety and welfare of society and the continued confidence of the public in law enforcement officials require this. The privilege against self-incrimination, in this context, does not demand the contrary.

POINT II

The New Jersey Supreme Court has full responsibility over the internal administration of the state judicial system including the issuance and disposition of local traffic tickets, and there was no denial of due process of law because the New Jersey Supreme Court which affirmed the convictions herein ordered an investigation to be conducted by the Attorney General with respect to "ticket-fixing" activities and, without further intercession by the court, the matter was referred to the prosecutor who completed the investigation and the criminal prosecution.

Appellants argue that the actions of the New Jersey Supreme Court as the "actual instigator of these criminal cases" resulted in a denial of due process (Ab50). It is suggested argumentatively that the involvement of the New Jersey Supreme Court by initiating the investigations and directing the referral of the matter to the county prosecutor cast such a pall over the entire proceedings that it deprived "the whole course of criminal procedure in the New Jersey courts of the appearance of the basic disinterestedness and impartiality which was so much a part of the hallmark of due process of law" (Ab51). This argument, sounded in ringing tones, is replete with insinuations, but wholly lacking in factual support. It obscures the premise that the New Jersey Supreme Court has the primary responsibility to supervise the entire court system in the public interest and to assure the proper administration of justice. And it proceeds completely without basis for the allegation that there was animus or vindictiveness on the part of the Court in its judicial review of the trial court's convictions.

A. The Supreme Court of New Jersey has full control and jurisdiction over the state judiciary including the supervision of the operations of Municipal Courts and the issuance and disposition of local traffic tickets.

Under provisions of the New Jersey Constitution of 1947, *Art.* VI, the Chief Justice of the Supreme Court is the "administrative head of all courts in the State", *N. J. Const., Art.* VI, §VII,, *par.* 1. And "under the settled construction of *Art.* VI, §II, *par.* 3 of the Constitution of 1947, the Supreme Court has exclusive and plenary power to promulgate rules governing practice and procedure in our courts". *George Siegler Co.* v. *Norton,* 8 N. J. 374, 381-386, 86 A. 2d 8 (1952); see also, *In re Pfizer,* 6 N. J. 233, 78 A. 2d 80 (1951).

> "The rule making power of the Supreme Court . . . is not a privilege to be exercised by it (the court) at its option; on the contrary, it is a duty that the justices of the Supreme Court must exercise as part of their constitutional obligations . . . ." *State* v. *Otis Elevator Co.,* 12 N. J. 1, 14, 95 A. 2d 715 (1953).

Since it is well settled that the magistrates' courts are a part of the state judiciary, *In re Mattera,* 34 N. J. 259, 168 A. 2d 38 (1961); *Krieger* v. *Jersey City,* 27 N. J. 535, 143 A. 2d 564 (1958), it, therefore, necessarily follows that such courts are subject to the rule making power of the Supreme Court, *State* v. *Ahrens,* 25 N. J. Super. 201, 95 A. 2d 255 (App. Div. 1953), as well as to the common law supervisory power of the Supreme Court over the inferior courts within its jurisdiction. Not only does the supervisory power extend to rule making and administration, but it also extends to the power to control the ministerial officers of the courts. *Pino* v. *Bertone,* 26 N. J. Super. 429, 98 A. 2d 345 (L. Div. 1953).

The New Jersey Supreme Court has regulated with meticulous care the conduct of municipal court proceedings with respect to the issuance and disposition of traffic tickets. Rule 8:10 of the New Jersey Rules of Practice, pertaining to local criminal courts, specifies with particularity the procedures to be followed in cases involving so-called "traffic offenses". This Rule prescribes that there shall be a uniform traffic ticket as formulated by the Administrative Director of the Courts; the manner in which the complaint and summons, *i.e.*, the traffic ticket, is to be issued; the manned in which traffic tickets are to be printed and distributed to law enforcement officers and the records and reports which must be kept with respect to their proper disposition. It is further provided that "Any person who aids in the disposition of a traffic ticket or summons in any manner other than that authorized by the court shall be proceeded against for contempt in accordance with Rule 4:87-2." R.R. 8:10-2, as amended. The Administrative Office of the Courts, in accordance with the Rules of Practice of the New Jersey Supreme Court, has issued a "Prescribed Procedure for the Issuance and Control of the Uniform Traffic Ticket." Appendix A hereto, pp. 1a-9a, *infra*.

It is not remarkable that the New Jersey Supreme Court has this responsibility for the supervision of the state judiciary. Indeed this power is inherent.

> "... [I]t is well settled that the highest court in any common law jurisdiction has such supervisory power, derived from the English Common Law, as it may find essential to the effective administration of justice within its jurisdiction," *Kendall* v. *United States*, 37 U. S. (12 Pet.) 524 (1838).

It is beyond question that the highest court in a common law jurisdiction has such power so as to assure that the inferior courts do not depart from proper judicial activity, become dictatorial or oppressive in their conduct, or otherwise behave improperly so as to interfere with or reflect upon the court system, or shake public confidence in the administration of justice or the judiciary. *State* v. *Scarborough*, 75 N. M. 702, 410 P. 2d 732 (1966).

Thus, it becomes clear that the New Jersey Supreme Court, as the highest court in the jurisdiction, is duty bound to supervise the performance of the entire court system, including the magistrates' courts. "Responsibility for a result implies powers reasonably necessary to achieve it. More specifically, the power to make rules imparts the power to enforce them." *In re Matter*, *supra*, 34 N. J. at 272.

The appellants cite *Massett Building Co.* v. *Bennett*, 4 N. J. 53, 71 A. 2d 327 (1950) as standing for the principle that the judiciary should not engage, in a wholesale manner, in nonjudicial activity. *Massett* is not applicable to the instant case, for here the judiciary has not entered into a nonjudicial activity. On the contrary, the Supreme Court, by requesting the Attorney General to investigate what seemed to be certain irregularities within its own branch, acted in a manner consistent with its duties and responsibilities under both the common law and the Constitution of New Jersey.

B. The Supreme Court of New Jersey was neither prejudiced, as a matter of law, nor is there any factual basis to support a finding of actual prejudice or partiality legally sufficient to require a reversal of appellants' conviction.

What appellants find offensive as a matter of due process is the action on the part of the highest court of a state "to act as a complainant, investigator, prosecutor and ultimate judge in a given case" (Ab51). In overdramatizing the issue, appellants misstate it.

Evidently, the appellants contend that the New Jersey Supreme Court, by requesting the initial investigation by the Attorney General, became a prejudiced court and could not constitutionally sit as a competent court of review. *In re Murchison,* 349 U. S. 133 (Ab51) was concerned with the "one man judge-grand jury system" that operated pursuant to Michigan law. In that case this Court held that it was a violation of due process because of the danger of inherent prejudice for a judge to sit as a trial judge upon a case the result of his own bill of indictment in his grand jury role.

The instant matter is not remotely analogous. The New Jersey Supreme Court did not act as a grand jury. To the contrary, the appellants were indicted by a regularly impaneled grand jury sitting in Camden County, New Jersey, after a presentment by the prosecutor of that country. Thus, the New Jersey Supreme Court did not take any part in the accusatory procedures as was true in *Murchison, supra.* Moreover, no adverse inference can be drawn fairly from the fact that the Court certified the case on its own motion. This it may do under its rules of procedure. R.R. 1:10-1(a). This it has frequently done in a large number of appeals which it hears annually (Appendix B, pp. 12a-13a, *infra*).

In *Tumey* v. *Ohio,* 273 U. S. 510 (Ab53), this Court reversed a conviction of one found guilty of a violation of the local liquor law by a mayor whose remuneration depended upon a conviction. In that case, not only did the hearer have a direct pecuniary interest in a conviction, but the town of which he was mayor shared in the fine money. In *Tumey* it was held that because of such an interest the hearer was, as a matter of law, unqualified to sit and that to do so would result in a violation of due process of law. Herein, the Court had no such material or pecuniary interest. Its only interest, and an interest which is common to all courts, was that justice should prevail and that the integrity of the courts should be maintained.

It is a well settled doctrine that a fair trial is one in which the bearer is able to make a final decision upon the evidence adduced rather than upon extra-record material or knowledge. The fact that the hearer may have certain prejudices that may affect his verdict is not alone enough to disqualify him as long as it is made clear that he is able to decide the case upon the evidence presented. *American Tobacco Co.* v. *United States,* 147 F. 2d 93 (6th Cir. 1944), *aff'd* 328 U. S. 781 (1945); *Reynolds* v. *United States,* 98 U. S. 145 (1878). It is not enough that a possibility of prejudice exists. What must be proven is that "those strong and deep impressions which close the mind to a fair consideration of the case existed." *Reynolds* v. *United States, supra,* 98 U. S. at 155, citing Justice Marshall in *United States* v. *Burr,* 25 Fed. Cas. 51 (1807). Such allegations must be substantiated by facts and reasons and not by mere conclusions or speculations; such charges, furthermore, should be most carefully considered in order to safeguard the judiciary from frivolous attacks upon its dignity and integrity. *United States* v. *Valenti,* 120 F. Supp. 80 (D. N. J. 1954). Such prejudice, more-

over, will neither be inferred nor presumed but must be proved with definiteness and certainty. *Cf. In re Larsen,* 17 N. J. Super. 564, 86 A. 2d 430 (App. Div. 1952).

It cannot be seriously contended that because the New Jersey Court has administrative responsibility with respect to the conduct of state judicial officers, that criminal sanctions are preempted merely because the Court itself suspects criminality on the part of those subject to its supervision. In disciplinary matters, for example, evidence presented to the Court relating to professional conduct may also involve criminality for which criminal sanctions are appropriate. *In re Orsini,* 37 N. J. 500, 181 A. 2d 771 (1962). As stated by the New Jersey Supreme Court in *In re Mattera, supra,* 34 N. J. at 266, 267, 168 A. 2d at 42:

> "A single act of misconduct may offend the public interest in a number of areas and call for an appropriate remedy as to each hurt. Thus it may require removal from public office. It may also require removal from public office. It may also require criminal prosecution. Still further it may require that the roster of attorneys be cleansed of a miscreant. The remedies are not cumulative to vindicate a single interest; rather each is designed to deal with a separate need. We can think of no reason why a prescription in the Constitution of a remedy for one purpose should be found to bespeak an intention to deny government the power to protect the public in its other interests or to immunize the offender from the further consequences his act would otherwise entail. *Cf. Reilly* v. *Ozzard,* 33 N. J. 529, 539 (1960)."

The allegations of the appellants herein do not meet the bare requirements necessary to show actual or presumed

prejudice by the New Jersey Supreme Court. It is to be emphasized that the New Jersey Supreme Court did not sit as a trier of the facts. The evidence adduced at the trial level, even apart from the self-incriminatory statements of the defendants, demonstrated guilt. And, the essential issue raised in this appeal by appellants involves essentially a legal question as to whether or not the defendants' statements can be considered voluntary. The New Jersey Supreme Court had nothing whatever to do with respect to the propounding of the questions, the defendants' responses to the questions or the admission of the defendants' answers into evidence at the trial. The New Jersey Supreme Court touches this issue only in its capacity as an appellate tribunal. The appellants have not presented any facts or reasons which prove that the Court was prejudiced.

POINT III

Appellants have no standing to raise on appeal before this Court for the first time the issue that their convictions should be reversed because there was a denial of due process as a result of prejudice of the New Jersey Supreme Court.

Appellants gloss ever so lightly the question of whether they are entitled to raise the issue as to the alleged deprivation of due process attributable to the prejudice of the New Jersey Supreme Court. They state somewhat elliptically that their failure to raise this issue cannot "invest the state court procedure with an aura of constitutional respectability" (Ab53). As demonstrated under *Point II, supra,* the state court procedure was constitutionally fair and respectable as such—and not by appellants' failure to raise the issue.

It is a well established rule that a litigant cannot raise in a court on appeal a point not raised below. *McCandless* v. *Furland,* 293 U. S. 67; *Parker* v. *Motor Boat Sales,* 314 U. S. 244; *Oklahoma* v. *U. S. Civil Service Commission,* 330 U. S. 127; *Globe Indemnity Co.* v. *Calbeck,* 230 F. Supp. 14 (D. C. S. D. Texas 1960).

Appellants in the case at bar, after remaining silent on the point in the court below, now challenge the competency of the New Jersey Supreme Court. This failure to raise the contention in the trial court falls directly within the ambit of the stated rule. Moreover, the United States Supreme Court has placed another prohibition on appellants' actions. In the case of *Blair* v. *Osterlein,* 275 U. S. 220, 225, Mr. Justice Stone, speaking for the Court stated: "It is only in exceptional cases and *then only in cases from the federal courts,* that questions not pressed or passed upon below are considered here." (Emphasis supplied.)

A litigant is not entitled to challenge for the first time on appeal the competency of a court when it has not been raised below. *Kramer* v. *U. S.,* 166 F. 2d 515 (9th Cir. 1948); *Taylor* v. *U. S.,* 179 F. 2d 640 (9th Cir. 1950); *Lucas* v. *U. S.,* 325 F. 2d 867 (9th Cir. 1963). In *Laughlin* v. *U. S.,* 151 F. 2d 281 (D. C. Cir. 1945), the court held that where a party had knowledge sufficient to disqualify a judge prior to the beginning of trial, failure to challenge until trial was correctly dismissed. Failure to make such a motion timely was said to constitute a waiver of the challenge. *Id.*

In *Pacheco* v. *Puerto Rico,* 300 F. 2d 759 (1st Cir. 1962) where the judge who acted as committing magistrate was later elevated and presided at trial, the court of appeals held that appellant, by waiting until his appeal to raise the challenge had waived whatever right he might have had. The court cited *Yakus* v. *U. S.,* 321 U. S. 414, 444 which stated:

> "No procedural principle is more familiar to this court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."

In the case at bar, the appellants were at all times fully aware of the totality of facts involved. It would seem that there are no circumstances whatsoever to justify any departure from the established principle, and for this reason it is submitted that appellants' challenge must be disregarded.

CONCLUSION

For all of the foregoing reasons, it is respectfully suggested that (1) the appeals herein be dismissed or, if viewed as petitions for writs of *certiorari*, the petitions be dismissed; (2) if the appeals herein not be dismissed or if they be deemed petitions for writs of *certiorari* which be granted, the judgments affirming the convictions of the appellants should be upheld and affirmed.

Respectfully submitted,

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